

Patel (Migration) [2020] AATA 1191 (21 April 2020)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs Sweta Bhadresh Patel
Mr Bhadresh Rajendrabhai Patel
Master Mihir Bhadreshbhai Patel

CASE NUMBER: 1728604

DIBP REFERENCE(S): BCC2016/765183

MEMBER: Andrew McLean Williams

DATE: 21 April 2020

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicants Regional Employer Nomination (Permanent) visas.

Statement made on 21 April 2020 at 3:01pm

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) (Class RN) visa – Subclass 187 (Regional Sponsored Migration Scheme) – Retail Manager – bogus document – academic qualifications – non-accredited and non-operational education providers – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 187.213; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made on 30 October 2017 by a delegate of the Minister for Immigration to refuse to grant the applicants Regional Employer Nomination (Permanent) visas, under s.65 of the *Migration Act 1958* ('the Act').
5. The applicants applied for the visas on 23 February 2016. The delegate refused to grant the visas on the basis that the first-named applicant ('the applicant') did not satisfy the requirements of cl.187.213 of Schedule 2 to the *Migration Regulations 1994* ('the Regulations'), because cl.187.213(1) requires that the applicant satisfy, *inter alia*, public interest criteria ('PIC') 4020.
6. So far as is relevant, PIC 4020 requires that there be no evidence before the Minister that the applicant has given, or caused to be given, to the Minister or an officer of the department a 'bogus document', or 'information that is false or misleading in a material particular' in relation to the application for the visa, or a visa that the applicant had held in the 12 months prior to the making of the application.
7. As part of her application the applicant had declared on 23 February 2016 that she had studied and gained the following qualifications:
 - Techno Global University, Bachelor of Arts, (15 June 2010 to 15 July 2013);
 - Academy of Global Studies, Diploma in Business Administration, (15 June 2007 to 5 June 2010).
8. Inquiries conducted by the Department as part of the assessment of the applicant's visa application revealed that, although registered in 2008, the Techno Global University only commenced its operations in 2017, and its credentialing details were known by the university to have been misappropriated, and to have been used to issue false degree certificates prior to 2017. Similarly, inquiries made with the Academy of Global Studies ('AGS') revealed that the AGS conducts no classes, no instruction, nor any form of training, and that it is not affiliated with any official body in India that regulates the provision of education or the conferral of degrees. These revelations amount to 'adverse information' for purposes of s.57 of the Act.
9. After having first provided the applicant with an invitation to comment on the adverse information and to make any submissions regarding either compassionate or compelling circumstances that might justify the waiving of PIC 4020(1) and (2), the delegate determined that the applicant had provided misleading information to the Department regarding her educational qualifications in relation to the visa application, meaning that the applicant did not meet the requirements for the granting of a subclass 187 visa. It is this decision that the applicant now seeks to have reviewed before the Tribunal.
10. The applicants appeared before the Tribunal on 20 February 2020 to give evidence and make submissions. The Tribunal hearing was conducted with the assistance of an interpreter in the Gujarati and English languages.
11. The applicants were represented in relation to the review by their registered migration agent, Mr Shoaib Vahora. The representative attended the Tribunal hearing and made submissions.

12. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.187.213 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); **and**
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); **and**
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); **and**
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
14. The requirements in PIC 4020(1) and (2) can be waived if there are compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
- Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**
15. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5), and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision).
16. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the definition of bogus document in s.5(1) of the Act has no comparable requirement that false or misleading statements be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in PIC 4020(1) not to provide a bogus document or false or misleading information applies irrespective of whether the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of deliberately untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was

aware the information was deliberately untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

19. Prior to the hearing before the Tribunal the applicant submitted evidence to the Tribunal, in the form of a letter, ostensibly from the Director of the AGS that stated that the applicant had studied a Diploma of Business Administration at that institution, and had passed with an 'A' grade, in 2010. The applicant also submitted documentary evidence from the Techno Global University, asserting that the applicant had been a *bona fide* student of the Faculty of Arts at the Shillong Campus, between July 2010 and June 2013.
20. During the Tribunal hearing on 20 February 2020 the adverse information regarding the bogus educational certificates was put the applicant in the manner required under s.359AA Act. In her oral evidence the applicant stated that she had attended classroom-based instruction in the case of each degree, and had paid fees and submitted assessment items, including oral assessments. By means of her authorised representative, the applicant then requested further time to provide her response to the adverse information. The applicant was then granted 14 days (until 6 March 2020) to provide any other response to the adverse information.
21. Also on 20 February 2020, the Tribunal wrote to the applicant pursuant to 359(2) and invited the applicant to make submissions regarding any compelling circumstances that might be relied upon to justify the granting of a subclass 187 visa, giving the applicant until 5 March 2020 to make any response thereto.
22. On 5 March 2020 the applicant submitted further documentary evidence to the Tribunal. The additional evidence included:
 - a statutory declaration from a Mr Pravikumar Punjabhai Patel, the father of the applicant, made on 2 March 2020, declaring that the applicant had studied a Bachelor of Arts of the Shillong Campus of the Techno Global University between July 2010 and June 2013; further stating that the declarant had paid her tuition, accommodation and living expenses;
 - A statutory declaration from a Mrs Nidhi Yogesh Agrawal, also made on 2 March 2020, declaring that she had also been an arts student at the same time as the applicant at the Techno Global University Shillong Campus, and had also been a room-mate, residing with the applicant. The declarant further stated that she had similarly graduated from the Techno Global University, prior to 2017.
23. In addition to this evidence, the applicant provided a written submission, by means of her authorised representative, dated 5 March 2020. In that submission, the authorised representative reiterates that the applicant had studied a Diploma of Business Administration at the Academy for Global Studies ('AGS') between 2007 and 2010, which pre-dates any enquiries by Australian Consular staff in India on behalf the Department in either 2016 or 2017, revealing that the AGS conducts no classes, instruction, or training and that it is not affiliated with any official body in India that regulates the provision of education or the conferral of degrees. The applicant submits that the enquiries conducted by Consular staff in 2016 or 2017 are therefore insufficient to show what the AGS was doing between 2007 and 2010, such that the evidence provided by the applicant should be regarded as sufficient to show the true provenance of the Diploma of Business Administration conferred on the applicant by the AGS.
24. The inquiries undertaken by the department give rise to sufficient reasonable basis to believe that the applicant did not study and complete a diploma course at the Academy for

Global Studies and that the qualification she provided from the AGS is not recognized by the Indian authorities. By her submission to the Tribunal the applicant submits that she did undertake studies at the AGS and invites the Tribunal to speculate that the AGS has since transformed its mode of operation - away from the provision of accredited diploma courses to more recently become instead an overseas tour and travel agency - sometime after the applicant had already graduated, in 2010. Yet, none of the evidence provided by the applicant goes so far as to show that the AGS has transformed itself in the manner now suggested by the applicant. In assessing the competing evidence the Tribunal now prefers the evidence obtained by the Department regarding the false provenance of the Diploma in Business Administration and concludes that the evidence provided by the applicant does not displace the evidence that the applicant has given or caused to be given to the Minister or an officer of the Department or to the Tribunal a document that amounts to a bogus document.

25. In relation to the Bachelor of Arts degree from the Techno Global University, the applicant submits that the statutory declaration evidence most recently provided – that by both her father and her former university roommate - goes to show that the applicant did complete a Bachelor of Arts at the Shillong Campus of the Techno Global University between 2010 and 2013. However, the applicant also submits that the fact of her having been conferred with a Bachelor of Arts by the Techno Global University is ultimately not relevant to the skills assessment required for a subclass 187 visa, because subclause 187.234(c) in schedule 2 of the Migration Regulation requires only a diploma-level qualification, for the nominated position of Retail Manager (ANZSCO Category 142111).
26. The Tribunal attaches no weight to the statutory declaration evidence very recently provided by both Pravikumar Punjabhai Patel, and Nidhi Yogesh Agrawal. Neither declarant has been cross-examined, such that the reliability of their evidence remains completely untested. Moreover, the Tribunal observes that the nature of the adverse information regarding the bogus nature of the Bachelor of Arts degree from the Techno Global University is a matter that has been known to the applicant since her receipt of correspondence from the Department dated 25 September 2017 regarding this adverse information. Despite that knowledge, statutory declarations from these declarants was not provided by the applicant in her response to the Department's invitation to comment on the adverse information in 2017, and nor were statutory declarations from these two declarants submitted to the Tribunal as part of the applicant's evidence in support of her application for review filed on 17 November 2017. This evidence was only provided on 5 March 2020, and no effort has been made by the applicant to explain why this evidence was not provided far sooner. Furthermore, neither declarant provides any evidence to address the central adverse fact, which is that the Techno Global University itself has declared that it has not ever conferred a degree to any person.
27. By her authorised representative's submission, the applicant has not specifically sought to address the adverse information that the Techno Global University did not commence operations until 2017; has not awarded any degrees to date; and has publicly announced by means of its website that the credentialing details of the Techno Global University have been misappropriated, and used to issue false degree certificates. The Tribunal now attaches greater weight to the evidence obtained by the Department that the Techno Global University was non-operational until 2017 and to the publicly available information from the Techno Global University website that to this day continues to specify:
 28. "Techno Global University Shillong, has never started any academic activity since inception. We have never issued any marksheet, certificate and degree to any person. We have also never authorised any person or institution to act on behalf of us".
29. Rather than deal with this adverse information, the applicant seeks to submit that, even if the Bachelor of Arts degree from the Techno Global University nominated by her in her subclass

187 visa application is a bogus document, that fact should now be overlooked as an irrelevant matter to the skills required for a subclass 187 visa. The Tribunal does not accept that submission. Whilst the submission may have some application to PIC 4020(1) in the particular case of 'information that is false or misleading in a material particular', because of the definition afforded to that category of matter in PIC 4020(5)(b), that reasoning does not apply *mutatis mutandis* in the case of bogus documents, this is because of the disjunctive 'or' used between these two category of things in PIC 4020(1) and the different definition for bogus documents given by s.5 of the Act. See also: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

30. Therefore, the Tribunal is satisfied that there is evidence that the applicant has given or caused to be given to the Minister, or an officer of the Department and now also to the Tribunal, a 'bogus document', as defined in s.5(1)(a) of the Act, in relation to her application for the visa, such that the applicant **does not** meet the requirements of PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

31. The requirements of PIC 4020(1) and (2) may be waived, if there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
32. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
33. The applicant has made no submissions in response to the invitation given by the Tribunal to make submissions as to why there might be any compassionate or compelling circumstances under either of PIC 4020(4)(a), or (b). Nor have any such grounds revealed themselves to the Tribunal from a review of any of the documentary materials available to the Tribunal.
34. Therefore the conclusion of the Tribunal is that the requirements of PIC 4020(1) **should not** now be waived.
35. On the basis of the above, the applicant **does not** satisfy PIC 4020 for the purposes of cl.187.213.

DECISION

36. The Tribunal affirms the decision not to grant the applicants Regional Employer Nomination (Permanent) visas.

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...